

Appeal of: :
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OFEGRO, : HUDBCA NoB. 88-3410-C7
89-4469-C7 :
(Contract Nos. HC-14476; 3-86-1-6921) :
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DECISION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

July 22, 1991

Statement of the Case

By letter dated March 7, 1988, the Organization for Environmental Growth ("Appellant" or "OFEGRO") filed a timely notice of appeal from a final written decision of a contracting officer of the U.S. Department of Housing and Urban Development ("HUD" or "Department"), which disallowed certain claims made by the Appellant, under the Changes clause of Contract No. 3-86-1-6921. By letter dated March 24, 1989, Appellant filed a timely appeal of the contracting officer's final written decision dated March 13, 1989, which partially terminated the contract for default. These appeals were consolidated for hearing, and a hearing was held on February 27-28, and March 1, 1990. Post-hearing briefs have been submitted by both parties.

Findings of Fact

1. On September 27, 1986, HUD and the Small Business Administration ("SBA") entered into Contract No. HC-14476 under Section 8(a) of the Small Business Act, 15 U.S.C. S 647, as amended. This firm fixed-price contract called for the performance of a number of services, including research, analysis, and the production of a written report on the impact of group homes on residential property values. (Appeal File ("AF"), tab 2a).

2. OFEGRO submitted a proposal to HUD dated July 16, 1986, for the performance of the contract work. OFEGRO's proposal contained the following relevant provisions:

DETAILED SCOPE OF WORK

Task II - Literature Search

Objective

2.2 Furnish Government Technical Representative (GTR) with a list showing:

- a. name of the study;
- b. who conducted it;
- c. where it was conducted, and
- d. what issue(s) each deals with in the study.

Activity 2.1 - Literature Search

OFEGRO will develop a resource list of contacts, clearinghouses, technical libraries, organizations and individuals from which to identify existing studies dealing with the establishment of group homes in residential areas and their impacts on property values and other related issues.

OFEGRO has prepared a preliminary listing of these studies for your review and modification and selection of appropriate studies for further research; and included the listing in the proposal. The listing is not totally complete, but does provide a listing of the relevant studies contained in the U.S. HUD library, Library of Congress, and American Institute of Architecture.

Task III - Study/Analysis

Objective

- 3.1 Analyze a maximum of ten (10) studies.
- 3.2 Prepare a written analysis for review by the GTR and a panel of experts.
- 3.3 Review of analysis by GTR and panel of experts.
- 3.4 Meet with GTR to discuss revised draft and content of the final report.

Activity 3.1 - Analysis of Existing Studies

OFEGRO will review and analyze a maximum of ten (10) studies identified by the GTR. OFEGRO will identify the following:

- a. purpose of the study;
- b. the methodology used;
- c. the findings of the study;
- d. author's conclusions;
- e. OFEGRO's conclusions;
- f. author's recommendations;
- g. OFEGRO's evaluation of author's recommendations;
- h. OFEGRO's recommendations.

Activity 3.2 - Draft Retort Preparation

OFEGRO will synthesize the information collected into an Executive Summary to include the following information:

Introduction
Background
Purpose [Goals and Objectives]
Methodologies
Findings [to include strategies used in each study]
Conclusions
Recommendations

The Executive Summary will be organized and laid-out in such a manner that the information presented will be thorough, clear, easily understood and appealing.

Activity 3.3 - Submit Draft to GTR and Panel of Experts

A draft Executive Summary will be submitted to the GTR and panel of experts for review and comments. The GTR and panel of experts will review and submit written comments and return to OFEGRO within one week after receipt of draft report.

Activity 3.4 - Meet with GTR to Discuss the Comments and Contents of the Final Report

OFEGRO will meet with the GTR to discuss all comments received. Within three (3) weeks following the approval of the draft, OFEGRO shall develop and submit to the GTR, a camera-ready, production - finished, finalized copy of the Executive Summary, totalling not more than twelve (12) pages. Once approved OFEGRO shall proceed to the tasks of printing approximately Four Hundred (400) copies of the Executive Summary.

Task IV - Final Report

Objective

4.1 Develop a final report that is attractively designed and geared to the needs of the user

4.2 Develop a final report that provides information collected from the analysis of the existing studies prepared on group homes.

4.3 Develop a final report that focusses (sic) on some strategies that may be used to deal with other issues that discourage the use of group homes in residential communities.

4.4 Develop a final report that will:

- a. ensure ease of use for people without a technical background in the subject matter;
- b. include a "how to" format;
- c. not be lengthy or bulky, or entail overly descriptive information;
- d. have a layout which enhances readability and will be designed to respond to the user's needs and questions;
- e. include use of boldface type, underscoring or other techniques to clearly present information;
- f. include a cover or other packaging design; and

g. use of photographs that depict group homes in residential areas.

Activity 4.1 - Final Report Printing

OFEGRO will produce Four Hundred (400) copies of a maximum twelve (12) page Executive Summary that focuses on strategies that local sponsors may use to respond to the issue that group homes may impact negatively on residential property values, including some strategies that may be used to deal with other issues that may commonly become stumbling blocks to the efforts of sponsors to establish group homes in residential neighborhoods.

The Executive Summary will be printed on eighty pound (80 lb) coated glossy paper, two colors, printing on both sides, two 11 x 17" sheets of paper folded to 8 1/2 x 11" and saddle-stitched with a cover graphic illustration and between six and nine photographs to be dispersed throughout the report. Titles and subtitles will be in bold face type, with other graphic techniques used to represent information (sic) in a clear, concise and attractive form.

OFEGRO will deliver Four Hundred (400) copies of the printed final report to the GTR at the U.S. Department of HUD, 7th Streets (sic), S.W., Washington, D.C. (AF, tab 2b).

3. OFEGRO's proposal was prepared by its Project Manager, Frank Thomas. Thomas reviewed the requirements of the Department's original Request for Proposals ("RFP") and determined that OFEGRO could not perform all of the services set forth in the RFP because of the RFP's \$25,000 funding limitation. Thomas met in early July, 1986 with Cheryl Kent, the GTR, and Lucille Scruggs, another HUD employee, to discuss OFEGRO's concerns with the RFP. Thomas explained to Kent and Scruggs that HUD would either have to increase the contract price or modify the scope of the RFP. HUD accepted his recommendations and modified the scope of the contract to reflect his recommendations. Under these modifications, HUD agreed to: (1) assist OFEGRO with the research effort by providing OFEGRO with a list of studies; (2) permit OFEGRO to point out to HUD those studies which OFEGRO determined were related to the issues; (3) limit the selection of studies to be included in the report to a maximum of ten; and (4) select the panel of experts. The GTR also agreed to accept a twelve page "Executive Summary" as the Task IV report, similar in style and appearance to certain "Executive Summaries" which OFEGRO had prepared under contract to the U.S. Department of Transportation. (Tr., pp. 346-48; Board Exh. 1).

4. Under the terms of Subcontract No. 3-86-1-6921 dated September 27, 1986 ("the contract"), OFEGRO agreed to perform the contract work for a fixed price of \$30,911.84. OFEGRO's July 16, 1986 proposal was incorporated in the contract in full-text. (AF, tab 2a).

5. Under the "Special 8(a) Conditions" applicable to the contract and subcontract, SEA delegated to HUD the responsibility for administering the subcontract, and provided HUD with complete authority to take any action on behalf of the Government under the terms and conditions of the subcontract, including the authority to determine appeals under the

"Disputes" clause of the subcontract. The delegation also gave HUD the authority to terminate the contract for default or convenience, in whole or in part. (AF, tab 2a).

6. The contract "Statement of Work" ("SOW") specified, in relevant part, four tasks to be completed by OFEGRO, each of which was a separate "deliverable" under the contract. (AF, tab 2a, Statement of Work).

Under Task I, OFEGRO was to prepare a timetable and action plan for the performance of the contract. Under Task II, OFEGRO was to conduct a literature search to locate "all known" studies dealing with the establishment of group homes in residential areas. The SOW stated that a list of "computerized data bases" would be provided to OFEGRO by the GTR, as well as a list of HUD personnel who might be aware of additional sources of information for the literature search. Thomas interpreted the term "computerized data base" to mean an automated library card catalog, such as that found at the Library of Congress. The GTR interpreted the term to include automated data bases that could generate lists by subject or topic. Under Task III, OFEGRO was to prepare a draft report analyzing ten studies selected by the GTR. After review of the draft report by a panel of experts, OFEGRO was to meet with the GTR to discuss the draft report, the comments of the panel of experts, and the contents of the final report. Task IV required OFEGRO to deliver a final report for use by sponsors of group homes in residential areas. Under Task IV, OFEGRO was required to submit the final report to the GTR for review in "camera-ready" format, or otherwise in "clean-copy" format. If changes in the report were deemed necessary by the GTR, OFEGRO agreed to make such changes and to resubmit the report for final approval and acceptance by the GTR. (AF, tab 2a, Statement of Work; Tr. pp. 99; 354-55; 367-68).

7. The SOW set forth seven guidelines for writing the Task IV report. These guidelines are identical in all material respects to the guidelines in OFEGRO's proposal. (AF, tab 2a).

8. The standard Federal Acquisition Regulation ("FAR") Order of Precedence clause (FAR 52.215-33) (Jan. 1986), Disputes clause (FAR 52.233-1) (Apr. 1984), and Changes - Fixed Price clause (Alternate I, Apr. 1984) (FAR 52.243-1) were incorporated by reference in the contract. (AF, tab 2a).

9. The contract specifications required delivery of the final report within five months of the effective date of the contract. OFEGRO's proposal specified a sixteen week performance period. (AF, tab 2a).

10. Notwithstanding the September 26, 1986 effective date of the contract, Thomas and the GTR began working together on the Task II literature search in early September, 1986. On or about September 3, 1986, the GTR sent Thomas a list of organizations and individuals that had expertise in the field of disability rights that Thomas could contact for assistance in conducting the literature search. In late September or early October, 1986, the GTR supplied Thomas with extensive bibliographies prepared by other organizations, including the "CRISP" study by the American Planning Association, and a bibliography by the Mental Health Law Project. Thomas reviewed these lists, made written remarks in the margins, and returned them to the GTR on October

9, 1986. (Tr., pp. 100-108; pp. 358, 360-361; Govt. Exhs. A, B; App. Exhs. 1, 5-6).

11. On November 14, 1986, Thomas delivered the Task II literature search ("bibliography") to the GTR. On December 4, 1986, the GTR advised Thomas in a telephone conversation that eighteen of the reports in the bibliography seemed particularly relevant to the contract and that Thomas should attempt to obtain copies of these studies. She also instructed Thomas to use his own judgment in selecting the ten most useful studies. Thomas obtained copies of fifteen of these studies by December 31, 1986. (Tr., pp. 111-117, 205-209; pp. 391-392, 398-400; AF, tab 5a, Progress Report dated January 7, 1987).

12. Thomas testified that it was difficult to analyze the studies identified by the GTR, because many of the studies were based on: (1) unscientific methodologies; (2) questionable sampling techniques; (3) unsupported conclusions; and (4) overly broad generalizations. As a result, Thomas stated that he had to perform additional research to obtain valid information. (Tr., pp. 393-400)

13. Despite a number of telephone inquiries from the GTR to Thomas between December 4, 1986 and March 13, 1987 regarding the status of the draft report, OFEGRO did not deliver the draft Task III report to HUD until March 13, 1987. Thomas stated that he was working on the report and that he would do his best to deliver it as soon as possible. The GTR received the draft report on March 20, 1987, when she returned from travel; she then forwarded it to the review panel. (Tr., pp. 120-121).

14. The draft Task III report was reviewed by the GTR and a by a panel composed of HUD employees and experts on group home related issues. The GTR did not provide written evaluation guidelines to the panel members. She orally instructed the HUD panel members to review the draft Task III report within the context of the SOW, and instructed the other panel members to review it as experts in their fields. The panel and the GTR were generally critical of the report, finding that it: (1) was too long (119 pages); (2) contained information and analyses not required by the contract; (3) was based on twenty-three studies as opposed to the ten study requirement of the contract; (4) was disorganized; and (5) used language that was offensive to disabled people. (Tr., pp. 120-127; AF, tab Sc).

15. On March 25, 1987, the GTR and other HUD officials met with Thomas and discussed the deficiencies in the draft Task III report. Thomas was informed that the draft contained too many terms that could be perceived negatively, such as "notorious" and "school for the idiots." Thomas explained at the meeting that these terms were direct quotes from reports and a court case. Thomas was also informed that the underlying factual information was sufficient, but that he needed to revise other information, rewrite the introduction, and put his findings and any "positive" information at the beginning of the report. Thomas assured HUD that it was "normal procedure to submit [the] draft in this form [and] then to incorporate their comments into the report." (Tr pp. 408-409; Tr., pp. 128-129; Govt. Exh. D, journal entry dated March 25, 1987).

16. Thomas received a copy of the written comments of panel member Arlene Kanter dated April 6, 1987. Kanter's comments were extremely

critical of the report and the project, which she characterized as a "waste of the taxpayers' money." Although the GTR instructed Thomas to ignore Kanter's letter, Thomas wrote a five page letter to the GTR dated April 15, 1987, to rebut Kanter's comments. Thomas' letter also made a number of suggestions to improve the report, which were accepted by the GTR. (AF, tab 3a; Tr., p. 133).

17. By letter dated May 13, 1987, Thomas requested that the GTR inform him of the status of the review and formal critique of the Task III report. The letter stated that OFEGRO's cost to complete the project had been increased by the slippage in the delivery schedule and requested that the review be completed expeditiously to prevent additional cost to OFEGRO. (AF, tab 3b).

18. By letter dated May 27, 1987, the GTR apologized for the delay in providing written comments on the draft Task III report, stating that she did not receive the report in the agreed upon time frame, and that when she did receive it, other priorities and HUD business travel prevented her from completing the review sooner.

The letter instructed Thomas to improve the draft Task III report by: (1) deleting the background/historical section; (2) revising the introduction and purpose sections by moving the conclusions section forward and combining it with the introductory and purpose information and a statement of the overall conclusions; (3) deleting from the studies section those studies which were annotated bibliographies or summaries and the Supreme Court brief; and (4) editing the report to remove any inappropriate terms.

The letter also stated that the GTR preferred that the review panel not review the revised Task III report, but that if Thomas concurred, the panel would comment on the first draft of Task IV report. The letter further stated that "this would change Tasks III and IV in the Statement of Work to have the review occur under Task IV instead of Task III." With respect to the final report, the GTR instructed Thomas that the final report should focus on strategies that local sponsors of group homes may use to deal with the issue of group home impact on property values.

The letter contained a list of ten studies to be included in the final Task III report, and accepted Thomas' proposal in his letter dated April 15, 1987, to include relevant findings from any of the studies that were not among the ten studies identified by the GTR. Thomas testified that one of these studies was not included on the December 4, 1986 list of studies which the GTR identified in a telephone conversation. The letter also stated that OFEGRO might be able to obtain photographs for the report from a number of individuals that Thomas had previously interviewed. (AF, tab 3d; Tr. p. 402; App. Exh. 10).

19. Thomas worked on the Task III and Task IV reports during the months of June, July and August, 1987. On August 7, 1987, Thomas delivered a draft Task IV report to the GTR for final review by the panel of experts. (AF, tab 5a, progress reports for the months of June and July, 1987; Govt. Exh. D, journal entries for the period May - August, 1987).

20. The draft Task IV report, which was reviewed by the panel of experts and was rejected by the GTR by letter dated September 3, 1987, which OFEGRO received on September 11, 1987. The letter stated, inter alia, that the draft final report was unacceptable because the report: (1) did not focus on strategies that local sponsors could use in dealing with the issue that group homes may impact negatively on residential property values; (2) did not include strategies for dealing with other issues that may commonly become stumbling blocks to the efforts of sponsors of group homes; (3) did not comply with the SOW requirements to ensure ease of use, include a "how to" format, not be lengthy or bulky, or entail overly descriptive information, and did not have a layout which enhances readability; and (4) was poorly organized, used inappropriate language when referring to people with disabilities, and lacked a careful edit for grammar and punctuation. The letter concluded that corrective action would have to be taken before October 23, 1987, at no increase in contract price. (AF, tab 3e).

21. OFEGRO's President, Edward K. Johnson, sent a letter dated September 10, 1987, to Robert Ardinger, Program Manager, FHEO, asserting a \$31,650 claim under the Changes clause of the contract. As grounds for the claim, the letter asserts that: (1) OFEGRO was "never provided with the timely submission of research reports required by the Government;" (2) HUD doubled the amount of required research; (3) HUD did not provide OFEGRO with adequate technical support; (4) HUD did not perform timely reviews of OFEGRO's submissions under the contract, and as a result, OFEGRO's printing costs increased. The letter also claims that OFEGRO's personnel costs increased as a result of the alleged delays, because the delays made it necessary to retain staff that could otherwise have been released. (AF, tab 3g).

22. In September, 1987, the contracting officer sent a letter to Johnson, which requested OFEGRO to inform HUD in writing, by September 25, 1987, of OFEGRO's "proposed effort to cure the deficiencies listed in the GTR's letter dated September 3, 1987." Johnson replied by letter dated September 24, 1987, which states, in relevant part, that HUD was responsible for much of the delay in contract performance and that HUD had increased the costs to perform the contract by insisting on a number of changes during performance. The letter also requested that a meeting be scheduled to resolve all outstanding issues and the additional costs incurred by OFEGRO. (AF, tabs 3f, 3g).

23. By letter dated September 25, 1987, addressed to OFEGRO, the GTR stated that HUD had provided OFEGRO with "more technical support than it deserved" under the contract; that the selection of ten studies could not begin until the GTR received the bibliography resulting from the literature search, which was not received until November 14, 1986 six weeks after the contract was signed; that she never required Thomas to review more than ten studies, but only suggested that he review certain studies for background information; that if Thomas analyzed more than ten studies, he did so on his own initiative; and that OFEGRO's draft Task IV report was unacceptable for the reasons outlined in HUD's letter of September 3, 1987. The letter concluded that OFEGRO had thirty days from September 25, 1987 to submit a revised Task IV report, or to notify the GTR when the Task IV report would be completed. (AF, tab 3h).

24. Representatives of OFEGRO and the Department met on October 21, 1987, to discuss OFEGRO's claims and the contents of the Task IV report. The Department took the position at the meeting that the contents of the Task IV report were specified adequately in the contract; that OFEGRO was responsible for any delays in performance; and that OFEGRO's changes and delay claims were inadequately documented. The Department also represented at the meeting that it would attempt to locate suitable photographs for the report. The meeting resulted in a stalemate on the changes clause issues and the setting of a delivery date for the Task IV report. (Tr. pp. 19, 20, 149, 431).

25. By letter dated October 30, 1987, addressed to the contracting officer, OFEGRO informed the Department that it would complete the Task IV report "once the HUD technical representative(s) identifies and selects those items from the most recently submitted final comprehensive analysis . . . for inclusion in the final 12 page Executive Summary Report." The letter also requested that the contracting officer issue a final decision on OFEGRO's claims under the Changes clause of the contract. (AF, tab 3i).

26. By letter dated December 2, 1987, OFEGRO informed the contracting officer that it "still did not have the necessary information . . . to complete the requirements of the contract." (AF, tab 3j).

27. The contracting officer denied OFEGRO's Changes clause and delay claims in a final written decision dated December 10, 1987 on the grounds that: (1) the claims were not adequately documented; (2) OFEGRO was not required to analyze more than ten studies, but was referred to other studies for background information; (3) the delays were not the fault of the Department, but were attributable to a two-month delay on the part of OFEGRO in submitting the literature search, a six month delay on the part of OFEGRO in submitting the research analysis draft, and an additional 2-1/2 month delay in obtaining the comments of the review panel, which was attributable to the late submission of the research analysis draft. (AF, tab 1).

28. Kent and Ardinger informed the contracting officer by memorandum dated March 23, 1988, that they had not received the Task IV report. They recommended to the contracting officer that he terminate the contract for default if an acceptable final report was not delivered to HUD within ten days of notification to OFEGRO. By letter dated August 1, 1988, the contracting officer informed OFEGRO that he was considering the possibility of terminating OFEGRO's contract for default. The letter informed OFEGRO that it had ten days to either deliver an acceptable final report or demonstrate that its failure to perform arose out of causes beyond its control and without its fault or negligence. (Supplemental Appeal File ("Supp. AF"), tabs 3m, 4i).

29. OFEGRO replied by letter dated August 9, 1988, which asserted that termination for default was inappropriate because HUD had not provided OFEGRO with a critique of the final Task III report and because HUD had failed to identify the portions of the Task III report that it wished to be included in the Task IV report. OFEGRO concluded that because of the excessive amount of time that had lapsed, it could not establish a completion date until HIJD provided it with a complete review of the Task III report. (Supp. AF, tab 3n).

30. Representatives of OFEGRO and the Department met in October, 1988 and discussed OFEGRO's Changes clause claims and the delivery of the Task IV report. The contracting officer informed OFEGRO at that meeting that he would send OFEGRO a letter outlining the Government's requirements for the final report. (Tr. pp. 30-31, 161).

31. By letter dated November 10, 1988, the contracting officer informed OFEGRO that the Department expected to receive the Task IV report within thirty days of OFEGRO's receipt of his letter. The letter reiterated that the Task IV report should: focus on strategies that local sponsors of group homes may use to deal with the perception that group homes may impact negatively on residential property values; list perceived problems arising out of the location of group homes; describe whether these perceptions are accurate; describe the actual impact on residential property values; identify strategies that can be used in combating the perceived negative impact on property values of placing a group home in a residential neighborhood; and include strategies for dealing with other problems identified in the Task III analysis. The letter also stated that the format of the report should comply with the seven items listed in Task IV of the SOW, including the use of photographs, possibly provided by the GTR, and otherwise by the contractor if the GTR did not have sufficient photographs. (Supp. AF, tab 3o).

32. Both the contracting officer and GTR testified that OFEGRO agreed at the October, 1988 meeting to deliver a Task IV report within thirty days of receipt of a letter from the contracting officer, which the contracting officer sent on November 10, 1988. The purpose of that letter was to provide OFEGRO with guidance as to the contents and appearance of the final report. Thomas' only testimony on this point was that this aspect of the negotiation conducted at the October, 1988 meeting, which Thomas attended, was led by Johnson, and that Johnson "would probably be the better person . . . to speak for the firm . . . because he would have made any agreements at that meeting." OFEGRO did not call Johnson as a witness. We find the testimony of the GTR and contracting officer to be credible evidence that the delivery schedule was reestablished by negotiation in October, 1988. This testimony is corroborated by the contracting officer's letter of November 10, 1988, and was not rebutted at hearing. (Tr., pp. 29-31; pp. 158-162; pp. 476-477).

33. In late November, 1988, OFEGRO delivered to the Department a nineteen page draft Task IV report. This report was not "camera ready," and did not contain all of the items required under Task IV of the SOW, such as photographs, allegedly because OFEGRO wanted HUD approval of the contents of the report before incurring printing costs. In OFEGRO's experience, it was normal for a draft final product to be submitted for review before proceeding to printing. OFEGRO's cover letter dated November 22, 1988, also stated that OFEGRO could not print the 400 copies of the report for the original proposed cost, and that a contract modification was needed to reflect these increased costs. The letter further stated that OFEGRO would not proceed with the printing until it had received authorization from the contracting officer. (Tr., p. 436; Supp. AF, tab Se).

34. The Task IV report which OFEGRO delivered in November, 1988 did not meet a number of the requirements set forth in Task IV of the SOW and the DSOW. The report did not focus on strategies that sponsors of group homes could use to confront the perception that group homes have a negative impact on property values. The first eight pages of the report merely set forth the chronology of work performed under the contract. Strategies were not mentioned in the report until page 12, and then only briefly. The report also did not meet the Task IV requirement to address other negative perceptions about group homes, e.g., increased crime rates. The report was not submitted in clean-copy, camera ready format, did not make use of techniques such as boldface type, did not contain photographs, and did not have a cover or package design. (Tr., pp. 164 - 171; Supp. AF, tab Se).

35. The contracting officer rejected the November 1988 Task IV report in a show cause notice dated December 30, 1988. The notice stated that the report was unacceptable for the reasons stated above and because the credibility of the data could not be verified. The notice concluded that OFEGRO could avoid a termination for default by submitting an acceptable final report within ten days of receipt of the show cause notice, and that failing to do so, OFEGRO had ten days from the date of receipt of the notice to demonstrate that its failure to perform arose out of causes beyond its control and without its fault or negligence. (Supp. AF, tab 3p).

36. OFEGRO replied to the show cause notice by letter dated January 17, 1989. The letter states, in relevant part, that: (1) the resource material selected by the GTR contained little information with respect to strategies, despite the GTR's extensive interest in the inclusion of strategies. It was accordingly necessary to base certain conclusions on interviews with experts and personal experience; (2) the contract does not contain any direction or requirement stating a specific format and that designation of a format would constitute a change to the contract; (3) it is not reasonable to expect the layout of text to be final when photographs or other graphic aids remain to be inserted; (4) once HUD has approved the contents of the report, the camera-ready copy will include photographs and a layout with cover and other packaging design; and (5) up to the time of delivery (November 22, 1988), OFEGRO believed that HUD would supply photographs, and that it was HUD's responsibility to notify OFEGRO if HUD was unable to supply photographs. (Supp. AF, tab 3q).

37. The contracting officer attempted unsuccessfully to settle the dispute before terminating the contract. When it appeared unlikely that the Task IV report would be delivered, and upon the advice of the program office that the need for the report had diminished, the contracting officer terminated the contract for default by final written decision dated March 13, 1989, for failure to deliver the final report. (Tr., pp. 37-38, 88; Supp. AF, tab 1A).

Discussion

OFEGRO contends that it is entitled to an equitable adjustment for a number of constructive changes and delays caused by HUD which it alleges occurred during performance of the contract. OFEGRO further contends, on a number of bases, that the contract was improperly terminated for default. The Government contends that no additional work

was required or approved by the contracting officer or his authorized representative. The Government further contends that the default termination was proper because OFEGRO's Task IV report-did not substantially comply with the contract specifications.

A. Constructive Changes Claims

A constructive change giving rise to an equitable adjustment occurs when a contractor performs work beyond that required by the contract without a formal change order and it is perceived that such work was informally ordered by the Government or caused by Government fault. Where, as a result of Government misinterpretation of a contract provision, a contractor is required to perform more or different work, or to comply with higher standards not called for under the terms of the contract, the contractor is entitled to an equitable adjustment pursuant to the Changes clause, including extensions of time. Emerson-Sack-Warner Corp., ASBCA No. 6004, 61-2 BCA 3248 (1961), and cases cited therein. OFEGRO has the burden of proof in establishing a constructive change where there has been no formal change order issued by the contracting officer. Watson Rice & Company, HUDBCA No. 89-4468-C6, 90-1 BCA 22,499.

A constructive change is made up of two elements - the "change" element and the "order" element. To find the change element, we must examine the actual performance to see whether it went beyond the minimum standards demanded by the terms of the contract. Industrial Research Associates. Inc., DCAB No. WB-5, 68-1 BCA ¶ 7069. But, this is also not the end of the matter. The order element also is a necessary ingredient in the constructive change concept. To be compensable under the changes clause, the change must be one that the Government ordered the contractor to make. The Government's authorized representative, by word or deed, must require the contractor to perform work which is not a necessary part of the contract. This is something which is different from advice, comments, suggestions, or opinions which Government technical personnel frequently offer to a contractor's employees. Id. at 32,866.

Computerized Data Bases

OFEGRO contends that a constructive change occurred as a result of the Government's failure to provide it with a list of "computerized data bases" as specified under Task II of the SOW. OFEGRO asserts that as a result, it was forced to engage in a manual research effort far beyond that contemplated by the parties to the contract. This assertion is not persuasive.

The GTR interpreted the term "computerized data base" to include automated systems that could generate lists by subject matter or topic. OFEGRO's project manager, Frank Thomas, interpreted the term to mean automated card catalogs, such as that found at the Library of Congress, upon which he relied, in part, in preparing the list of studies that was attached to OFEGRO's proposal. There is no evidence in this record that either party to the contract understood the term to include comprehensive systems that could extract extremely detailed information, such as a list of issues discussed in relevant reports. It is uncontested that Thomas was only able to obtain rudimentary information from the Library of Congress automated card catalog, such

as author, title, publisher, and date of publication. There is no evidence in this record of the existence of a more comprehensive system. Although the Government did not provide OFEGRO with a list of "computerized data bases," the GTR provided OFEGRO, on September 3, 1986, with a list of organizations and persons who maintained relevant data bases, almost a full month before the effective date of the contract. Moreover, in late September or early October, 1986, the GTR provided OFEGRO with two bibliographies which contained extensive listings of potentially relevant studies, including not only author, title, and date of publication, but additional information such as type of work, area of study, purpose of the study, methodology, findings, and conclusions. The information which the GTR provided OFEGRO in the bibliographies was vastly more extensive than the information which OFEGRO was able to obtain from the Library of Congress card catalog.

We find that the Government timely supplied information to OFEGRO which exceeded the scope of the information which the parties anticipated would be retrievable from "computerized data bases." Many of the studies which Thomas cited in the Task III and Task IV reports were referenced in the Government supplied bibliographies. We conclude, accordingly, that the GTR's failure to provide OFEGRO with a list of "computerized data bases" beyond the information timely supplied to OFEGRO by the GTR was not a violation of the contract terms and does not support OFEGRO's contention that there was a constructive change in the contract.

Extra Research and Analysis

OFEGRO next contends that HUD constructively changed the contract by requiring it to perform research in excess of that required under the contract. OFEGRO's argument in support of a constructive change is essentially that: (1) OFEGRO's only research requirement under the contract was to analyze ten studies to be selected by the GTR; (2) the GTR, for a variety of reasons, caused OFEGRO to examine more than ten studies; and (3) the GTR directed OFEGRO to contact a number of non-Government employees. The Government asserts, in defense of this claim, that it did not order OFEGRO to examine more than ten studies or to conduct discussions with non-Government employees, but suggested that it might be helpful to do so, because OFEGRO was experiencing difficulty in performing the contract.

It is clear that the GTR suggested to OFEGRO that OFEGRO might find it useful to examine more than ten studies, or that OFEGRO might find it useful to talk to certain individuals with expertise in the subject matter in question. These suggestions appear to have been made to assist OFEGRO in its research efforts, and not to expand the scope of required research. Moreover, there is no evidence in this record that would compel the conclusion that these suggestions were coercive in any respect. Suggestions, if not coercive, are insufficient to establish the "order" element of a constructive change. Space Services of Georgia, Inc., ASBCA No. 25973, 81-2 BCA 15,250.

OFEGRO's interpretation of the contract appears to rely on certain provisions in its proposal under the headings "Proposed Changes to the Statement of Work" and "Detailed Scope of Work," which state that OFEGRO would analyze a maximum of ten studies to be identified by

the GTR. OFEGRO's reliance on the provisions of the "Proposed Changes to the Statement of Work is misplaced.

By virtue of the incorporation by reference in the contract of OFEGRO's entire proposal, the contract contains three sections which contain performance-related language, including the sections of the proposal entitled "Proposed Changes to the Statement of Work" and "Detailed Scope of Work." The contract also contains the Government-drafted SOW. Neither party has addressed, with any particularity, the issues of ambiguity or conflict as a result of this circumstance. We do not find the provisions of the proposal under the heading "Proposed Changes to the Statement of Work" to be contract specifications, because there is insufficient evidence in this record to support a conclusion that the parties intended these provisions to be specifications. This heading strongly suggests that these provisions were included in the proposal for the purpose of negotiation. In addition, OFEGRO's project manager testified that, subsequent to negotiation, the language of the SOW was changed to meet the concerns raised in its proposal. (Tr. pp. 346-48). The incorporation of the entire proposal into the contract, an apparent by-product of loose contract administration, is insufficient, ipso facto, to convert the "proposed changes" into contract specifications. See Hesco Roofing, Inc., ASBCA No. 36,709, 89-1 BCA 1 21,204 (a contractor was not entitled to an equitable adjustment under a roof repair contract, because its interpretation of the contract was based on an unreasonable use of a portion of the contract intended for another purpose).

OFEGRO's argument is also flawed because its interpretation of the extent of its research duties under the contract as requiring it to read only ten studies is based on a selective reading of the contract. It is an elementary rule of contract interpretation that all parts of a contract must be read together and harmonized if at all possible. Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 1025, 351 F.2d 972 (1965). A corollary to this general rule of law is the principle that all provisions of a contract are to be given effect and no provision is to be rendered meaningless. Jamsar, Inc. v. United States, 194 Ct. Cl. 819, 442 F.2d 930 (1971). An interpretation will generally be rejected if it leaves portions of the contract language meaningless, useless, ineffective or superfluous. See Restatement (Second) of Contracts § 203(a).

Assuming arguendo that the proposed changes were part of the contract specifications, OFEGRO's interpretation of these provisions is made in total isolation from the Task II provisions of the contract, which required OFEGRO to perform a "literature search" in order to enable OFEGRO to produce a list of studies and to include a summary of the issues discussed therein. It is implicit in the requirement to perform a literature search that OFEGRO would have to become familiar, to some extent, with a reasonable number of studies in order to generate the list of studies to be provided to the GTR under Task II of the contract. OFEGRO's interpretation of the contract as requiring it to read no more than ten studies under any circumstance unreasonably limits the "literature search" requirement of the contract. The contract clearly required OFEGRO to perform research (Task II) as well as an analysis of the results of part of that research (Task III). While the analysis was to be limited under Task III to an analysis of ten studies, the initial research requirement was not so limited. We,

accordingly, reject OFEGRO's interpretation of the contract on this issue.

OFEGRO also asserts that by requiring the review of more than ten studies, HUD altered its method of performing the contract, which caused a change in the sequence of work. This claim is denied for the reasons stated above.

We find, however, that the contract was constructively changed to the extent that OFEGRO was directed by the GTR to analyze more than ten studies. The evidence shows that on December 4, 1986, Thomas was informed by the GTR that he was to use his own judgement in the selection of ten studies for analysis from a list of eighteen studies which she provided to him over the telephone. There is also evidence that the GTR later selected ten studies for inclusion in the Task IV report by letter dated May 27, 1987, and Thomas testified that at least one of these studies was not on the GTR's December 4, 1986 list. Based on a comparison of the two lists, it appears that the May 27 list may contain as many as five studies that were not included on the December 4 list. We find that the evidence introduced by OFEGRO is sufficient to make a prima facie case and to satisfy its burden of going forward, and is sufficient to shift the burden of persuasion to the Government.

The contract provides explicitly, in both the DSOW and SOW, that a maximum of ten studies would be selected by the GTR for analysis and inclusion in the Task III report. The contract further provides that the Task IV report would include some or all of the information from the Task III report. The contract did not contemplate the analysis of more than ten studies by OFEGRO in either the Task III report or the Task IV report. The Government was not without some reasonable means to refute this evidence, and can reasonably be expected to know why it became necessary to select additional studies for inclusion in the Task IV report. Indeed if the Government offered probative evidence that it was necessary to take this action because of some defect in the Task III report attributable to OFEGRO, OFEGRO's evidence might be overcome and the burden of persuasion successfully met by the Government. However, no such evidence has been presented.

Thus, it must be concluded that OFEGRO is entitled to its costs for analyzing any study selected by the GTR in the May 27, 1987 letter that was not included in the GTR's December 4, 1986 list.

OFEGRO further asserts that it is entitled to recover extra costs since it had to perform additional research because the studies elected by the GTR contained insufficient or otherwise invalid information. We find the evidence insufficient to support that conclusion.

Review Panel

OFEGRO asserts that the panel of experts was not objective and did not apply criteria established by the terms of the contract in the evaluation of the draft Task III report, and that as a result, the contract was constructively changed. We find no evidence that the panel's comments, actions, objectivity, or lack thereof caused OFEGRO to perform any work that was not required under the contract. To the contrary, the panel's criticism of the report went to the organization of the report, the validity of its findings, and the quality of

writing. The panel's criticism was within the proper exercise of its discretion and appears to be well-founded. While there is some evidence to support the conclusion that one panel member may have been less than fully objective, the GTR instructed OFEGRO to ignore her comments. Despite this advice, OFEGRO's project manager expended considerable time and effort in the preparation of a written rebuttal to the panel member's comments. Any cost associated with this effort is not a valid expense under the terms of the contract.

B. Delay Claims

There are no compensable delay or suspension of work clauses in the contract at issue. In the absence of a compensable delay clause providing otherwise, the contractor is not ordinarily entitled to compensation for delays. Fritz-Rumer-Cooke v. United States, 279 F.2d 200 (6th Cir. 1960). Government fault and ensuing liability can be found, however, if the Government breaches its implied duty not to hinder or interfere with the contractor's performance, or breaches its implied duty to cooperate with the contractor. An unreasonable denial of approvals or delay in giving approvals called for in a contract, for example, can constitute a breach of the implied duty to cooperate. See Hoel-Steffen Construction Co. v. United States, 231 Ct.Cl. 128, 684 F.2d 843 (1982).

OFEGRO contends that it is entitled to recover increased costs resulting from a number of Government-caused delays that occurred during contract performance, including the delay allegedly caused by the GTR's failure to make a timely selection of ten studies for inclusion in the reports. OFEGRO also asserts that the Department failed to review a number of reports which it submitted under the contract in timely fashion.

The Government argues that the GTR timely selected studies for inclusion in the reports upon OFEGRO's late delivery of its literature search. While the Government admits that it took considerable time to review reports which OFEGRO delivered under the contract, the Government contends that any delays in its review of these reports was the impact of OFEGRO's late submission of the reports, and argues on this basis that it is not responsible for these delays.

Timely Selection of Ten Studies

The record indicates that the effective date of the contract was September 27, 1986, and that the GTR did not select studies for inclusion in the reports until December, 1986. OFEGRO asserts that the GTR delayed its performance by failing to comply with the contractual requirement to review its literature search and select ten studies during the first two weeks of the contract, i.e., early October, 1986. We find this assertion unpersuasive for a number of reasons.

First, OFEGRO's assertion is based on the supposition that certain language in the "Proposed Statement of Work" obligated the Government to select ten studies for inclusion in the Task III and IV reports within two weeks of signing the contract. OFEGRO's proposal states, in relevant part, under the heading "Proposed Changes to Statement of Work" that "[t]he GTR must decide at the end of the first two (2) weeks of the contract whether or not to disregard the studies

that have not been collected, or to extend the contract performance period which impacts directly on the contractor's costs." (AF, tab 2a). We find this contention unpersuasive. We have earlier rejected OFEGRO's argument that the "Proposed Statement of Work" was a contract specification. Consequently, the Government cannot be bound by its terms.

Second, OFEGRO's assertion is based in large part upon OFEGRO's delivery to the Government of the list of studies that was attached to its proposal, a list which was submitted prior to the execution of the contract. OFEGRO contends that the GTR should have selected ten studies from this list in early October, 1986. This contention is flawed, however, because the GTR was under no contractual obligation to make a selection from this list. OFEGRO has even characterized this list as "incomplete" in its proposal. The SOW and DSOW, when read together, clearly required OFEGRO to deliver to the GTR a list of "all known studies." Upon delivery of the completed literature search on November 14, 1986, the GTR reviewed and selected eighteen studies for OFEGRO's consideration in a telephone conversation on December 4, 1986, which were by mutual agreement to be further narrowed down to ten studies by OFEGRO.

The evidence shows that the GTR timely selected studies in December, 1986 to be included in the reports once OFEGRO delivered a complete list of studies, as required under Task II of the contract. We find no compensable delay on these facts, because we find no Government fault. Although the evidence also establishes that the GTR selected one or more additional studies in May, 1987 to be included in the Task IV report, there is no evidence of any resulting compensable delay, as it appears that OFEGRO had previously reviewed these studies on its own initiative.

Report Approvals

It is uncontested that OFEGRO delivered its draft Task III report to the GTR on March 13, 1987; that OFEGRO met with the GTR and other HUD officials on March 29, 1987 to discuss deficiencies in the Task III report; and that the GTR informed OFEGRO, by letter dated May 27, 1987, of the specific changes that needed to be incorporated in the Task III report to render it acceptable to the Department. The elapsed time between the submission of the report and HUD's written comments was 75 days, rather than seven days, as required by the contract.

It is also uncontested that OFEGRO delivered its first draft of the Task IV report on August 7, 1987; that under a revised project schedule, the review of the draft Task IV report was to be completed by August 28, 1987; and that OFEGRO did not receive HUD's written comments on the draft Task IV report until September 11, 1987, fourteen days after the scheduled date.

OFEGRO contends that it is entitled to additional-compensation on the grounds that HUD did not timely review its draft Task III and IV reports. We agree.

The GTR testified that she was unable to review the draft Task III report in a more timely fashion because other commitments had arisen and because the panel of experts, who had agreed to review the

report at an earlier date, also had other commitments. These arguments are not persuasive. The evidence shows that a four month delivery schedule was included in the contract at OFEGRO's behest, primarily to control costs. Moreover, the DSOW states explicitly that the review of the Task III draft report was to occur within one week. We are not persuaded by the explanation of the GTR for the 68 day delay in the review of the Task III report. We are not persuaded that the GTR was the only HUD employee capable of performing the review, and can make no determination on this record as to the availability of the panel of experts. Had the Government offered probative and detailed evidence that the panel of experts could not have reviewed the report in more timely fashion because of OFEGRO's tardiness in delivering the draft Task III report, OFEGRO's evidence might be overcome. The GTR's general statements are insufficient to explain away this lengthy delay. With respect to the fourteen-day delay in the review of the draft Task IV report, we can find no justification for this delay.

In light of the evidence that OFEGRO's personnel and printing costs increased as a result of such delays, we find that OFEGRO is entitled to the additional costs of performance for 82 days of delay attributable to the Government, on the ground that the Government breached its implied duty to cooperate by its unreasonable delay in performing Government functions required by the contract. See Frontier Contracting Co., Inc., ASBCA No. 33658, 89-2 BCA ¶ 21,802. Inasmuch as the issue of quantum was not presented at the hearing, only an entitlement determination can be made on this record.

C. The Termination for Default

A termination for default is a drastic action which is only to be imposed for good cause and upon solid evidence. J.D. Hedin Construction Co. v. United States, 408 F.2d 424, 431 (Ct. Cl. 1969). The Government bears the burden of justifying its action when it terminates a contractor for default. Lisbon Contractors. Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). However, once the Government has demonstrated a lack of timely performance by the contractor, it is incumbent upon the contractor to justify an excuse for its nonperformance. Geomar Engineering. Inc., ENG BCA No. 5569, 90-1 BCA ¶ 22,425, and cases cited therein.

In the present case, the default clause of OFEGRO's contract authorizes the Government to terminate its contract for default upon a failure to perform a provision of the contract and to cure such a default within the prescribed time. The facts establish that OFEGRO did not deliver a final Task IV report. OFEGRO thus has the burden of demonstrating that its failure to perform was beyond its control or without its fault or negligence. Geomar, supra. See also Sonora Manufacturing, Inc., ASBCA Nos. 31,587 et al., 91-1 BCA ¶ 23,444 (termination for default is proper upon contractor's failure to timely deliver even if Government no longer has a need for the item). However, OFEGRO has not proffered evidence which demonstrates that its performance was conforming. OFEGRO, instead, alleges that: (1) its conduct was justifiable because the perceived defects in the Task IV report were caused by specifications that were too ambiguous to be utilized in the evaluation of its report; (2) the termination employs a non-contractual standard to the extent that it is based on the failure of the final report to utilize a "how to" format; (3) any deficiency in

the discussion of strategies was caused by the GTR, because she selected the ten studies for inclusion in the report and these studies allegedly contained insufficient strategy-related information; (4) it was not obligated, under applicable industry standards, to deliver a camera-ready Task IV report until the Government approved its draft Task IV report; and (5) it could not deliver a final report with photographs because HUD had not provided the photographs.

OFEYRO's arguments that the Task IV report specifications were ambiguous and that there was no contract requirement for a "how to" format are meritless. The Task IV report was to be a concise instruction manual using non-technical language to explain to sponsors of group homes "how to" utilize strategies enumerated in the report in dealing with a number of issues related to group homes. The report was to be professionally printed, attractively designed, and was to incorporate photographs of group homes, much like the report OFEGRO had previously prepared under a contract with the U.S. Department of Transportation, and which OFEGRO held up as a model during pre-award negotiations. These requirements were not met in OFEGRO's draft Task IV report, which contained sufficient material to meet the contract requirements, but which displayed a general lack of organization and poor writing.

Thomas' testimony that OFEGRO had a practice of submitting draft documents to customers for review prior to the submission of camera-ready documents is insufficient, standing alone, to establish the existence of a trade custom or practice. The contract clearly required the delivery of a camera-ready Task IV report with no provision for the submission of a draft Task IV report. In any event, the Government commented upon the insufficiency of the draft Task IV report in the December 30, 1988 show cause notice. OFEGRO's argument on this issue simply does not establish an excuse for non-performance.

OFEYRO claims that the termination of its contract for default was improper because the Government waived, and failed to re-establish, the delivery schedule. The Government admits that it waived the original delivery schedule, but submits that a new delivery schedule was set by mutual agreement of the parties at the October 20, 1988 meeting, as evidenced by the contracting officer's letter dated November 10, 1988. OFEGRO contends that the delivery schedule remained open to negotiation after the October 20 meeting, as indicated by the contracting officer's show cause notice dated December 30, 1988, which permitted OFEGRO ten additional days to deliver from receipt of that notice. We reject this argument having found that the parties mutually established a new delivery schedule at the October 20, 1988 meeting. OFEGRO's argument that the delivery schedule was unreasonably short fails for lack of proof, as the law presumes that the mutual agreement of the parties, representing the end product of independent negotiations, contains a reasonable result. ASC Systems Corporation, DOT CAB Nos. 73-37, 73-37A, 74-2, 78-1 BCA ¶ 13,119.

Although the contracting officer did not terminate the contract until March 13, 1989, this fact alone is insufficient to establish another delivery schedule waiver. For waiver of delivery schedules by acts or conduct of the Government, two basic elements are required: (1) conduct on the part of the Government which reasonably would indicate an election to continue the contract and is reasonably

believed by the delinquent contractor to constitute encouragement to proceed with performance after the delivery date has passed, and (2) incurrence of performance costs by the delinquent contractor in reliance thereon. See G & G Industries, Inc., ASBCA Nos. 26111, 26237, 84-1 BCA ¶ 16,999, and cases cited therein. See also DeVito v. United States, 188 Ct.Cl. 979, 413 F.2d 1147 (1969). The evidence does not establish that OFEGRO has met either of the cited criteria. Moreover, a forbearance period of this length, while unusual, is not unprecedented. G & G, supra at 84,675.

The evidence also establishes that the contracting officer considered a number of relevant factors at the time he terminated the contract. We find that the termination for default of Task IV of the contract was an appropriate exercise of the contracting officer's discretion. National Union Fire Insurance Company, ASBCA No. 34744, 90-1 BCA ¶ 22,266 citing Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

OFEGRO argues as an excuse for nonperformance that it could not perform Task IV until HUD supplied it with photographs to be included in the Task IV report. We find this argument specious. OFEGRO was primarily responsible, under the terms of the contract, for the inclusion of photographs in the Task IV report. HUD's offer to supply photographs, if available, did not transfer this responsibility to HUD. OFEGRO offered no evidence that it made a timely request for photographs and that HUD agreed, without qualification, to supply the photographs. It was OFEGRO's duty, not HUD's, to obtain the photographs in timely fashion, whether from HUD or other sources.

OFEGRO further asserts that the termination of its contract was improper because: (1) there was no termination clause included in the contract; and (2) the wrong termination clause was invoked in the termination notice.

While there is no dispute that the contract did not contain an "x" in Schedule I to signify the incorporation by reference of the fixed price supply and service "Default" clause (FAR 52.249- 8), all clauses required to be included in Government contracts are part of the contract. G.L. Christian and Associates v. United States, 312 F.2d 418, reh. den., 320 F.2d 345 (Ct.Cl.), cert. denied, 375 U.S. 954 (1963). As FAR 49.504 requires the inclusion of FAR 52.249-8 in this contract, we must take judicial notice of the fact that a Default clause was included as a provision in OFEGRO's contract as a matter of law. Firemen's Fund Insurance Co., ASBCA No. 38284, 91-1 BCA ¶ 23,439. Citing G.L. Christian and Associates, Id. As such, the contracting officer had proper authority to terminate the contract pursuant to FAR 52-249-8.

OFEGRO further asserts that the termination of its contract was improper because the contracting officer's default notice cited FAR 52.249-9 (Default, Fixed Price Research and Development), the wrong default clause, as authority for terminating the contract. It is a well-accepted principle that a party to a contract will not be denied relief when it invokes the "wrong" clause, but where another clause in the contract provides the appropriate relief for the harm alleged. J.V. Bailey Co., Inc., ENG BCA Nos. 5348, 5555, 90-3 BCA ¶ 23,179. We find on this basis that the termination of this contract was not rendered

invalid by the contracting officer's erroneous reference in the termination notice to FAR 52.249-9.

Conclusion

We conclude that OFEGRO has demonstrated that it was required to perform work beyond the contract requirements to the extent OFEGRO was required to analyze more than ten studies. We likewise conclude that OFEGRO is entitled to the additional costs of performance caused by 82 days of delay attributable to the Government. We further conclude that the Government has established that the OFEGRO failed to perform Task IV of the contract, and that OFEGRO has not demonstrated that its failure to perform was excusable.

For these reasons, the appeal is sustained in part and remanded to the parties for the negotiation of the changes claim and delay claim quantum. The remainder of the appeal is denied.

HUD BOARD OF CONTRACT APPEALS

Timothy J. Greszko
Administrative Judge

Concur:

David T. Anderson
Administrative Judge

Jean S. Cooper
Administrative Judge